

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID CHANDLER)	
Claimant)	
VS.)	
)	Docket No. 251,709
BAM, INC. and JACK L. PERRY d/b/a JOY AUTO SALES, et al.)	
Respondent)	
AND)	
)	
KANSAS RESTAURANT & HOSPITALITY ASSOC. SELF INSURANCE FUND)	
Insurance Carrier)	

ORDER

Claimant appeals from a preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes on May 8, 2001.

ISSUES

The Administrative Law Judge denied claimant an award of preliminary hearing benefits against any respondent. Claimant seeks review of Judge Barnes' findings that, at the time of his accident, claimant was an independent contractor for Joy Auto Sales and, therefore, he was not working as an employee of any respondent. Judge Barnes further found that Joy Auto Sales is a sole proprietorship owned and operated by Jack Perry and that he did not have a gross annual payroll of more than \$20,000. Therefore, the Kansas Workers Compensation Act did not apply to this claim. Included within the issues of whether the Kansas Workers Compensation Act applies to this claim is a question concerning what business entity or entities was claimant's employer, if any, and whether the Board should pierce the corporate veil of BAM, Inc. These issues are considered jurisdictional and are subject to review by the Board on an appeal from a preliminary hearing order.¹

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record compiled to date, the Board holds that claimant's accidental injury of December 15, 1999 arose out of and in the course of his employment with respondent, Jack Perry, that Mr. Perry satisfied the gross annual payroll requirements of

¹ K.S.A. 44-534a(a)(2) and K.S.A. 44-551(b)(1).

K.S.A. 44-505(a)(3) and, therefore, was subject to the jurisdiction and provisions of the Kansas Workers Compensation Act.

Claimant worked for Mr. Perry as a mechanic and a general laborer. Claimant applied for and was hired to work for Mr. Perry as an employee and not as an independent contractor. When claimant first spoke to Mr. Perry on November 11, 1999 at the Benton Antique Mall, he was given a form to complete entitled "Application for Employment."² He was to be paid \$10.00 per hour for his labor. Mr. Perry directed and controlled what work claimant performed and where he was to perform it. And, except for some of the repair work on a 1965 Mustang automobile, Mr. Perry also controlled when claimant would work. In Mr. Perry's absence, claimant was directed to take orders from Dale Bybee, who Mr. Perry described as his "right hand man." There was no discussion about who or what business claimant would be working for. Claimant assumed it was the Benton Antique Mall, but when he received his first paycheck it was from Joy Auto Sales.

Jack Perry is the owner of all of the named respondents as well as several other business enterprises. Only BAM, Inc. and ELDO, Inc. are incorporated. The rest are sole proprietorships. BAM, Inc. does business as Benton Antique Mall and Restaurant. ELDO, Inc. does business as EIDorado Antique Mall.

Claimant contends that he was an employee of Mr. Perry and/or of BAM, Inc. at the time of his accidental injury. Mr. Perry counters that claimant was an independent contractor. BAM, Inc. contends that claimant was either an employee of Mr. Perry d/b/a Joy Auto Sales or an independent contractor working for Mr. Perry at the time of his injury.

The employer's right to direct and control the method and manner of doing the work is the most significant aspect of the employer/employee relationship.³ The right of control and supervision over the work and over the worker mean the right to direct the manner in which the work is to be performed and the result which is to be accomplished.⁴

The evidence is heavily weighted in favor of an employer/employee relationship. The employment relationship was with Mr. Perry, but it is not clear whether it was with Mr. Perry as an individual or in his capacity as an officer of BAM, Inc. The distinction between the two was never made clear. Nevertheless, the finding of an employer/employee relationship is supported by the fact that for the most part Mr. Perry told claimant when and where to work. He prioritized the tasks claimant performed. Claimant was paid by the hour, not by the job. Even though there were no withholdings from his wages, claimant was not furnished a form

² Claimant's Exhibit 1 to May 30, 2000 Prel. H.

³ Wallace v. Secretary of Kansas Department of Human Resources, 236 Kan. 97, 689 P.2d 787 (1984) and Scammahorn v. Gibraltar Savings & Loan Assn., 197 Kan. 410, 416 P.2d 771 (1966).

⁴ McCubbin v. Walker, 256 Kan. 276, 281-82, 886 P.2d 790 (1994).

1099 and independent contractor status was never discussed. Mr. Perry and Mr. Bybee had the right of control and supervision over the work claimant was performing when he was injured. Furthermore, the work claimant was performing was an integral part of the regular business of the respondents.⁵

For purposes of the minimum payroll requirement of K.S.A. 44-505, the Board finds that the payroll of BAM, Inc. should be included as the payroll of Jack Perry. The corporation known as BAM, Inc. is essentially the alter ego of Jack Perry.⁶ Mr. Perry as President, Vice President, Secretary and Treasurer of BAM, Inc., used the corporation as a facade for his personal business operations. Funds were co-mingled and bills of his personal businesses and his other corporation were paid by BAM, Inc. Likewise, BAM, Inc. loaned money to Mr. Perry's personal businesses and other corporation with little or no documentation, formalities or intent of repayment. The corporation paid for advertising for Joy Auto Sales and also paid for the repairs to the building that was owned personally by Mr. Perry and his wife. While it appears that BAM, Inc. paid for all of the maintenance of the building, Joy Auto Sales paid no rent to BAM, Inc. for the space it used in the Benton Antique Mall. Although claimant was only paid by Joy Auto Sales he performed services for other of Mr. Perry's businesses. In fact, claimant was injured on the premises of the Benton Antique Mall while performing work that, at least in part, was for the benefit of BAM, Inc. Accordingly, the corporation BAM, Inc. and its sole stockholder Jack Perry should be treated as one and the same party.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order entered by Administrative Law Judge Nelsonna Potts Barnes on May 8, 2001, should be, and the same is hereby, reversed and remanded to Judge Barnes for further proceedings and/or orders consistent herewith.

IT IS SO ORDERED.

Dated this ____ day of September 2001.

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Norman G. Manley, Attorney for Respondent Jack L. Perry
Jeffery R. Brewer, Attorney for Respondent BAM, Inc. and its insurance carrier
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Workers Compensation Director

⁵ See Vol. 3 Larson's Worker's Compensation Law, § 62.01 (2000).

⁶ Kvassay v. Murray, 15 Kan. App. 2d 426, 808 P.2d 896 (1991). See also Vol. 6 Larson's Worker's Compensation Law, § 112.01 (2000).